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IN THE

# Supreme Court of the United States

October Term, 1969

**No. 1034**

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Ass't District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,
*Petitioners,*

*v.*

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,
*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION TO THE APPLICATION FOR A WRIT OF CERTIORARI

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### Opinions Below

In addition to the printed opinions below described in the Petition, on November 21, 1969 Judge Anthony J. Travia of the U. S. District Court for the Eastern District of New York granted respondents' motion for summary judgment enlarging his preliminary injunction order (which

is the subject of this appeal) into a permanent injunction directing the return of the seized film, and granted petitioners' cross-motion to dismiss the remaining causes of action in the complaint. This has not yet been reduced to written judgment form.

## Jurisdiction

Jurisdiction is as stated in the Petition.

## Question Presented

Whether the protection provided by the first amendment requires that a motion picture theatre owner be given an opportunity to be heard on the issue of obscenity before a film could be seized by the police?

## Statement

In addition to the facts stated in the Petition the following facts are pertinent:

The seized print of the film "Odd Triangle" was the only print to have ever been exhibited in Nassau County, New York, which has a population of over a million people. A second print of "Odd Triangle" was seized in adjoining Queens County on May 7, 1969, one day after the instant seizure in Nassau County. This print was the only one ever to have been exhibited in Queens which also has a population of over a million people. The film was not being exhibited anywhere else in the entire New York City

metropolitan area. The end result of the two successive seizures was that the film was forceably withdrawn from the entire New York audience potential so that anyone disposed to see the film in New York or Nassau could not.

This was accomplished on an ex parte application by the public prosecutor to a single criminal court judge who without benefit of hearing opposing argument or proof yielded to his personal and idiosyncratic notions of propriety.

The propensities of the District Court of Nassau County became apparent when in the face of Judge Travia's ruling that the film was unconstitutionally seized, it nevertheless denied respondents' motion to suppress its use at the state obscenity trial, and then knowing full well that Judge Travia's decision was sub judice in the Second Circuit Court of Appeals it forced respondents to trial before a decision could be handed down from the Second Circuit. Of course, it brushed aside all objections to the film coming into evidence. The result is that respondent corporation stands convicted in state court solely on the basis of evidence which the U. S. District Court and the U. S. Court of Appeals have ruled illegally obtained in violation of first amendment rights.

## Reasons for Denying the Writ

1. This Court has very recently denied certiorari in *Wilkinson* v. *Tyrone, Inc.*, 6 Cr. L. 4093, which involved precisely the same issue and factual background as the case at bar. There too, without benefit of a prior adversary hearing, a single film print was seized by police after

a judge who had viewed the film at the theatre issued search and arrest warrants. Surprisingly, petitioner argues that a distinguishing factor in the case at bar is that the film was ultimately proven obscene because of the state court conviction. This appears to be boot-strap reasoning because an eventual conviction based on illegally seized evidence does not retroactively cure an originally illegal procedure.

2. The various circuit courts of appeal that have passed on this issue are unanimous in their conclusion that a prior adversary hearing is a prerequisite to any seizure of a motion picture film.

> *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968);
> *Tyrone, Inc.* v. *Wilkinson* (4th Cir. May 6, 1969, —— F.2d ——);
> *Cambist Films, Inc.* v. *Duggan* (3rd Cir. Dec. 30, 1969, —— F. 2d ——);
> *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410 (2nd Cir., 1969).

3. There is no conflict within the Second Circuit Court of Appeals concerning the issue at hand. Petitioner argues that *U. S.* v. *Wild and Corrado*, —— F.2d —— (2nd Cir. 1969) upholds its contention that no prior adversary hearing is required where the products of the search are deemed to be instrumentalities and evidence of crimes. But that case concerned slides or still photographs intended to be sent through the mails and which were seized in a private residence. This is readily distinguishable from a motion picture film exhibited at a public theatre. "* * * films differ from other forms of expression." *Freedman* v. *Maryland*, 380 U. S. 51, 61.

"Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation." *Freedman* v. *Maryland,* 380 U. S. 51, 59.

4. Enforcement of state obscenity laws is not seriously impeded by the requirement of a prior adversary hearing. Other than sudden seizure without notice, the state has the following courses of action:

(a) It can commence a civil proceeding for an injunction pendente lite against the showing of an allegedly obscene form of expression, as provided in Section 22-a of the New York Code of Criminal Procedure, and which was sanctioned by this Court in *Kingsley Books* v. *Brown,* 345 U. S. 436.

(b) It can obtain an order to show cause why a film should not be seized as obscene.

(c) It may resort to its subpoena power.

(d) It may obtain an ex parte restraining order.

5. The impact on First Amendment rights of the seizure of a single film playing to a mass audience is the same as the seizure of a massive quantity of books.

In *Quantity of Copies of Books* v. *State of Kansas,* 378 U. S. 205, 84 S.Ct. 1723, this Court struck down a state statute authorizing the seizure of allegedly obscene books before an adversary determination of their obscenity. At page 11 of its petition, petitioner concedes that mass seizure under the authority of the search warrant issued ex

parte does present certain grave factual issues concerning freedom of expression. But a single film may be viewed by a thousand people the same way as a thousand books may be read by a thousand people. In either case an ex parte seizure does not adequately safeguard against the suppression of non-obscene expression.

## CONCLUSION

**For all of the foregoing reasons, the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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January 29, 1970